Filed 3/25/19 In re Y.S. CA1/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re Y.S., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. Y.S., Defendant and Appellant.	A154412 (Napa County Super. Ct. No. 20143444722)

Minor, having admitted the allegations of a delinquency petition, appeals the dispositional order placing him in a residential treatment program subject to various terms and conditions. He contends two of the conditions are unconstitutionally vague and overbroad. We agree and shall modify the conditions, without prejudice to the juvenile court making further modifications when the matter returns to that court.

Background

In response to a juvenile wardship petition (Welf. & Inst. Code, § 602, subd. (a)), minor admitted the allegations that he, then aged 15 and already a ward of the court, possessed child pornography (Pen. Code, § 311.11, subd. (a)), threatened to commit a crime resulting in great bodily injury (Pen. Code, § 422), committed battery (Pen. Code, § 243, subd. (e)(1)) and violated the terms of his probation (Welf. & Inst. Code, § 777).

According to the probation report, the allegations arise out of minor's conduct and relationship with his then 15-year-old girlfriend. The victim reported that minor was

physically abusive during their relationship and that, after they broke up, he posted threatening messages and a picture of the victim wearing only her underwear on Instagram. She reported that during their relationship she and minor were sexually active, that she had sent him nude photos of herself, and that they had taken videos of themselves while having sex. Minor threatened to post the additional photos online.

After sustaining the petition, the juvenile court continued minor as a ward and ordered that he be placed in a residential treatment program subject to various terms and conditions. Minor timely filed his notice of appeal.

Discussion

A juvenile court may impose on a probationer "any and all reasonable conditions that it may determine fitting and proper to the end that justice may be done and reformation and rehabilitation of the ward enhanced." (Welf. & Inst. Code, § 730, subd. (b).) "A juvenile court enjoys broad discretion to fashion conditions of probation for the purpose of rehabilitation and may even impose a condition of probation that would be unconstitutional or otherwise improper so long as it is tailored to specifically meet the needs of the juvenile." (*In re Josh W.* (1997) 55 Cal.App.4th 1, 5.) A condition of probation, however, may not be unconstitutionally vague or overbroad. "A probation condition 'must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated,' if it is to withstand a challenge on the ground of vagueness." (*In re Sheena K.* (2007) 40 Cal.4th 875, 890.) A restriction failing the test does not give adequate notice—"fair warning"—of the conduct proscribed. (*Ibid.*) A condition of probation is unconstitutionally overbroad if it (1) "impinge[s] on constitutional rights," and (2) is not "tailored carefully and reasonably related to the compelling state interest in reformation and rehabilitation." (*In re Victor L.* (2010) 182 Cal.App.4th 902, 910.) "The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the [minor's] constitutional right—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement." (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.)

Minor contends two of the probation conditions imposed by the juvenile court are unconstitutionally vague and overbroad. He acknowledges that he did not object to the conditions on these grounds in the trial court, but asserts correctly that an objection is not required to preserve a facial constitutional challenge. (See *In re Sheena K.*, *supra*, 40 Cal.4th at pp. 885-889; *In re Carlos C.* (2018) 19 Cal.App.5th 997, 1002, fn. 5.) "[W]e review constitutional challenges to a probation condition de novo." (*In re Shaun R.* (2010) 188 Cal.App.4th 1129, 1143.)

1. Condition 19

Condition 19 reads: "The minor shall not own, use, or possess any form of sexually arousing materials which include computer based movies, videos, magazines, books, games, sexual aids or devices, or any material which depicts partial or complete nudity or sexually explicit language, nor frequent any establishment where such items are the primary commodity for sale."

Minor contends that the terms "sexually arousing materials" and "sexually explicit language" render the condition unconstitutionally vague because they fail to provide sufficient notice of the materials he is prohibited from possessing. He contends the prohibition on possessing material that depicts "partial or complete nudity" or contains "sexually explicit language" is unconstitutionally overbroad because it unnecessarily interferes with his First Amendment rights. He also contends that the "use of the verb form of 'frequent' is unconstitutionally vague" because it provides no guidance on how often minor is prohibited from visiting such establishments.

A. The term "sexually arousing materials" should be modified.

In *In re D.H.* (2016) 4 Cal.App.5th 722, 728, the court found that the term "pornography" as used in a juvenile probation condition was "inherently vague and subjective." The court relied on *United States v. Guagliardo* (9th Cir. 2002) 278 F.3d 868 (*per curiam*), in which the court found that "a probationer cannot reasonably understand what is encompassed by a blanket prohibition on 'pornography' " because "[t]he term itself is entirely subjective; unlike 'obscenity,' for example, it lacks any recognized legal

definition." Minor argues that the same reasoning applies to the phrase "sexually arousing materials" as used in condition 19. (See *United States v. Adkins* (7th Cir. 2014) 743 F.3d 176, 194 [prohibition on "pornography or sexually stimulating material or sexually oriented material" is unconstitutionally vague].) Respondent does not dispute that the term "sexually arousing materials" is vague but argues that the problem can be cured by modifying the condition to apply to materials that are "primarily intended to cause sexual arousal." Although the primary purpose of material may not always be immediately apparent, we believe that this articulation will provide a sufficiently clear standard that in most instances minor will readily know whether materials are prohibited. (See *People v. Morgan* (2007) 42 Cal.4th 593, 606 [" ' "[A] statute is not void [for vagueness] simply because there may be difficulty in determining whether some marginal or hypothetical act is covered by its language." ' "].)

B. The prohibition of possession of material depicting nudity or containing "sexually explicit language" must be stricken.

The portion of the condition prohibiting minor from possessing " any material which depicts partial or complete nudity or sexually explicit language" is far broader than necessary or permissible.

In *In re Carlos C., supra*, 19 Cal.App.5th at p. 1002, the court held that a condition prohibiting possession of material depicting partial or complete nudity identical to the condition at issue in the present case was overbroad. The court observed that several federal circuit decisions had "struck down as unconstitutionally overbroad conditions prohibiting adult offenders from possessing depictions of nudity. [Citations.] The overbreadth of this type of condition is both sweeping and obvious: 'By its terms, it would prohibit [defendant] from viewing a biology textbook or purchasing an art book that contained pictures of the Venus de Milo, Michelangelo's David, or Botticelli's Birth of Venus, all of which depict nudity.' " (*Ibid.*) The court struck the prohibition, reasoning that "[r]estricting a minor's access to such a wide range of materials with potential artistic, cultural and/or educational value imposes a significant burden on the minor's

constitutional rights with little, if any, discernible impact on the minor's reformation and rehabilitation, even a minor adjudged to have committed a sex offense." (*Id*. at p. 1004.)

The same can be said of the prohibition on material that contains "sexually explicit language." The phrase would encompass, for example, many lauded works of literature, as well as "safer sex instructions . . . written in street language so that the teenage receiver can understand them." (*Reno v. ACLU* (1997) 521 U.S. 844, 853.)

The Attorney General argues that given the modification of the "sexually arousing materials" language adopted above, "the probation condition would forbid only the possession of material that depicts partial or complete nudity in order to provoke sexual arousal." The court in *Carlos C.* rejected a similar contention. The court explained, "The People's principal argument is not to defend the constitutionality of this condition but, rather, to construe it narrowly. It argues the disputed nudity language 'is not overbroad when considered in the context of the condition as a whole, and given its ordinary meaning and interpreted with common sense,' because it supposedly contains a limitation that the depiction be 'sexually arousing' in the manner of materials found in X-rated movies or adult bookstores. Thus, the People contend, as so construed [the challenged] condition does not prohibit [the appellant] from viewing displays of nudity in mainstream movies or television shows, or in great works of art or educational text books. We disagree. That interpretation is at odds with the plain text of what the court ordered. The People in fact have it backwards. The nudity language is not *limited by* the phrase 'any form of sexually arousing material,' but is a subcategory *identified as* (and therefore prohibited as) 'sexually arousing material.' " (*In re Carlos C.*, *supra,* 19 Cal.App.5th at p. 1003.) Similarly, under condition 19, even with the above modification, retaining the reference to materials that depict nudity or use sexually explicit language would appear to indicate that all such materials have the primary purpose of causing sexual arousal, and that the minor is prohibited from reading or possessing them.

We agree with *Carlos C.* that the prohibition on possessing material depicting nudity is unconstitutionally overbroad, as we conclude is the prohibition on possessing

material containing sexually explicit language, and we agree that the overbreadth is most appropriately rectified by striking the offensive verbiage.[1]

C. The word "frequent" should be replaced with clearer language.

Minor contends the use of the word "frequent" in the prohibition on "frequent[ing] any establishment where [prohibited materials] are the primary commodity for sale" renders the probation condition vague. He relies on the decision in *People v. Sanchez* (2003) 105 Cal.App.4th 1240, 1243, which struck as vague a probation condition that required the defendant to "disclose the areas he frequents." The Court of Appeal concluded that the phrase "areas frequented" had "no fixed meaning." (*Id*. at p. 1244.) The court pointed out that the dictionary definition of "frequent" is to "visit often," and that "one cannot determine with any degree of confidence whether the registrant must list places where he or she may be found daily, weekly, or even a couple of times a month." (*Ibid*.) The trial court in the present case plainly intended to prohibit *any* visits to establishments primarily selling prohibited materials. The court did not intend to permit minor to visit those establishments "infrequently." Accordingly, the condition should be modified to state that "minor may not knowingly visit any establishment where such items are the primary commodity for sale."

As modified, condition 19 shall read: "The minor shall not own, use, or possess any materials that have a primary purpose of causing sexual arousal, including computer-based movies, videos, magazines, books, games, sexual aids or devices, and nor shall he knowingly visit any establishment where such items are the primary commodity for sale." So modified, this probation condition will be sufficient to prohibit minor from possessing the types of sexually arousing materials that could impede his rehabilitation or threaten a recurrence of the behavior that resulted in him becoming a ward of the court.

[1] In light of this conclusion, we do not reach minor's additional argument that the phrase "sexually explicit language" is vague.

2. Condition 20

Condition 20 reads: "The minor is prohibited from participating in chat rooms, using instant messaging, or other similar communication programs." Minor contends the prohibition on the use of "other similar communication programs" is vague and overbroad. We agree.

Minor acknowledges that the prohibition on participating in chat rooms and using instant messaging provide sufficient notice of what is prohibited but contends that these two examples provide insufficient guidance as to what other means of communication are proscribed. Minor questions whether texting, email or all forms of Internet-based communications are disallowed. The Attorney General responds, "The context of the condition clearly indicates that [minor] is prohibited from using social media websites. Viewed in that light, the challenged term is not unconstitutionally vague." We question whether that interpretation is as clear as the Attorney General suggests, but even if so interpreted, the condition remains overbroad.

" '[T]he Internet, now past its nascence, comprises the "backbone" of American academic, governmental, and economic information systems.' " (*In re Stevens* (2004) 119 Cal.App.4th 1228, 1234.) Accordingly, "[r]estrictions upon access to the Internet necessarily curtail First Amendment rights." (*Id.* at p. 1235.) If the juvenile court intended to prohibit minor from making any use of interactive Internet programs, or even if its intent was limited to social media websites, the restriction is extraordinarily broad. The condition contains no exceptions for communications related to school, family, work, extracurricular activities, and the like. The Attorney General suggests that the court's "plain and permissible intent" was to prevent minor from accessing chat rooms, instant messaging and other social media primarily for the purpose of causing sexual arousal. If that was the court's intent, the condition as drafted is not so limited. Accordingly, we will modify the probation condition to so state. This modification is without prejudice to the juvenile court making further modifications to the condition that it may deem advisable. Options include prohibiting access only to certain Internet communication contexts (such as chat rooms), requiring approval for use of certain programs (see *People v. Pirali*

(2013) 217 Cal.App.4th 1341, 1350), or requiring adult supervision (see *In re Victor L.*, *supra*, 182 Cal.App.4th at p. 926; *In re L.O.* (2018) 27 Cal.App.5th 706, 713-714). But to effectively prohibit minor from participating in all Internet communications sweeps far too broadly, making it impossible for him to function in today's Internet-dominated society. In considering further modifications of the condition, the juvenile court "should consider the purpose that this condition is intended to serve, in the context of his other probation conditions, and how it may be tailored to best help [minor] avoid repeating his offense or generally aid in his rehabilitation." (*In re M.F.* (2017) 7 Cal.App.5th 489, 496.)

Disposition

Probation condition 19 is modified to read: "The minor shall not own, use, or possess any materials that have a primary purpose of causing sexual arousal, including computer-based movies, videos, magazines, books, games, sexual aids or devices, nor shall he knowingly visit any establishment where such items are the primary commodity for sale." Probation condition 20 is modified to read: "The minor is prohibited from participating in chat rooms or using instant messaging or other social media communication programs for the purpose of causing sexual arousal." In all other respects, the judgment is affirmed.

POLLAK, P. J.

WE CONCUR:

TUCHER, J.
BROWN, J.